Appendix B—Statutes Involved

FEDERAL POWER ACT

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * *

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

* * * * *

SEC. 4. The Commission is hereby authorized and empowered

* * * * *

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

* * * * *

SEC. 6. Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this Part and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 3743,

Revised Statutes, as amended (U.S.C., title 41, sec. 20). [1067, 49 Stat. 841; 16 U.S.C. 799]

* * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * *

SEC. 14. Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before

taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided,* That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

SEC. 15. That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be

issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof: *Provided,* That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

SEC. 23.

* * * * *

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and

among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

Appendix C—FPC Declaratory Order

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, David S. Black, and Carl E. Bagge.

NANTAHALA POWER AND LIGHT COMPANY

Docket No. E-7261

DECLARATORY ORDER

(Issued July 18, 1966)

The question presented is whether the Commission is foreclosed from requiring a license for operating and maintaining a hydroelectric development which affects the interests of interstate or foreign commerce within the Supreme Court's holding in *Taum Sauk*[1] by a Commission finding, which was made prior to the Supreme Court decision and which is not in accord with it, that the development would not affect such interests.

The proceeding arises on the Nantahala Power and Light Company's[2] petition for a declaratory order that seven constructed hydroelectric developments in the Little

1. *FPC* v. *Union Electric Co.*, 381 U. S. 90 (1965). Taum Sauk is the name of the development over which the Commission asserted jurisdiction in that case.

2. The company, a wholly owned subsidiary of the Aluminum Company of America, has its principal offices in Franklin, North Carolina.

Tennessee River basin do not require licenses under Part I of the Federal Power Act (16 U.S.C. 791-823).[3] It appears from the petition and is assumed for purposes of this proceeding that: (1) The streams on which the developments are located, being headwaters of navigable waters of the United States, are waters over which Congress has jurisdiction under the commerce clause. (2) The sections of the streams on which the developments are located are not themselves navigable waters of the United States. (3) The developments do not affect downstream navigable capacity. (4) Petitioner's power system is interconnected with those of Tapoco, Inc., and the Tennessee Valley Authority, and the energy produced at the developments enters the interstate power system formed by these interconnections.[4]

Section 23(b) of the Act requires anyone desiring to construct a hydroelectric development on a non-navigable stream, but one over which Congress has jurisdiction under the commerce clause, to file a declaration of intention. If the Commission finds that "the interests of interstate or foreign commerce would be affected by such

3. The developments and the streams on which they are located are as follows: (1) Nantahala project on the Nantahala River, Dick's Creek and White Oak Creek; (2) Thorpe project (formerly Glenville project) on the West Fork Tuckasegee River; (3) Queens Creek project on Queens Creek; (4) Tuckasegee project on the West Fork Tuckasegee River; (5) Cedar Cliff project on the East Fork Tuckasegee River; (6) Bear Creek project (formerly Bear Creek-Island Ford project) on the East Fork Tuckasegee River; and (7) Tennessee Creek project (formerly Wolf Creek project) on the East Fork Tuckasegee River.

4. The interconnection with TVA is pursuant to the so-called Fontana Agreements between the United States and Alcoa. The agreements, dating from 1941 and extending through 1982, provide that power generated by Petitioner be made available to TVA, which in turn make power available to Petitioner or Alcoa at the latter's aluminum smelting works at Alcoa, Tennessee. Tapoco, Inc., is another, wholly owned subsidiary of Alcoa.

proposed construction," the section prohibits the declarant from constructing, maintaining, or operating the development without a license. If the Commission makes the contrary finding, the section grants the declarant permission to construct the development upon compliance with state law. 16 U.S.C. 817.[5]

Petitioner's developments were built at various times between 1941 and 1955. Before construction was begun on each development, Petitioner filed the requisite declaration of intention. At the time the declarations came before the Commission, the "interests of interstate or foreign commerce" as used in Section 23(b) was treated as referring only to interests in navigation and water commerce. The Commission made the statutory finding, based on the existing facts and understanding of the law, that these

5. Section 23(b) provides in pertinent part:

> It shall be unlawful for any person . . . , for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States . . . except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person . . . intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation find that the interests of interstate or foreign commerce would be affected by such proposed construction such person . . . shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, . . . permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws

interests would not be affected by the proposed construction.[6]

In *Taum Sauk,* handed down in 1965, the Supreme Court rejected the assumption which underlay these findings. "Congress," it held, "drew [in Section 23(b)] upon its full authority under the Commerce Clause, including but not limited to its power over water commerce." *FPC* v. *Union Electric Co.,* 381 U. S. 90, 96 (1965). A corollary of the holding is that "Congress has required a license for a water power project utilizing the headwaters of a navigable river to generate energy for an interstate power system."[7]

Shortly after *Taum Sauk* was decided by the Supreme Court, we corresponded with Petitioner, among other owners of constructed developments, in an effort to encourage voluntary filing of applications for licenses. Petitioner's request for a declaratory order that its developments do not require licenses was filed on November 29, 1965.

Petitioner contends, in effect, that the Commission is foreclosed from correcting findings on declarations of intention which were made favorably to the declarant under an erroneous interpretation of the statute. It argues that the Commission lacks statutory authority to reconsider its findings on declarations of intention, or if

6. The findings are reported at 2 F.P.C. 753 (Nantahala project), 2 F.P.C. 754 (Thorpe project), 6 F.P.C. 426 (Queen's Creek project), 6 F.P.C. 756 (additional project works of the Nantahala project), 8 F.P.C. 690 (Tuckasegee project), 8 F.P.C. 1117 (Cedar Cliff, Bear Creek, and Tennessee Creek projects). The Fontana Agreement providing for interchange of power between Petitioner and TVA had been signed before all but the first two of these findings, but is not referred to in them.

7. The Commission decision in *Taum Sauk,* which reached the same result as the Supreme Court decision, was issued in 1962. *Union Electric Co.,* 27 F.P.C. 801 (1962).

the Commission does have the authority, it is barred from exercising it by the doctrine of equitable estoppel. Petitioner states that when the Commission makes findings on declarations of intention that proposed construction would not affect the interests of interstate or foreign commerce, the declarant receives a Congressional permit in perpetuity for its developments under the final sentence of Section 23(b) of the Act.

We conclude that none of these arguments nor any of Petitioner's several ancillary arguments is valid, and we order Petitioner to apply for licenses.

I

The Commission's findings on Petitioner's declarations of intention were based, as we have noted, on an erroneous conception of the governing law. The courts have left no doubt that administrative agencies in general, and the Commission in particular, have authority to correct mistakes of law and are not estopped from exercising this authority. The leading case is *Automobile Club of Michigan* v. *Commissioner,* 353 U. S. 180 (1957). There the Commissioner of Internal Revenue ruled in 1934 and 1938 that the petitioner was exempt from Federal income taxes because it was a "club" within the meaning of the internal revenue laws corresponding to Section 101(9) of the Internal Revenue Code of 1939 (26 U.S.C. (1935 ed., Supp. V) 101(9)). He revoked the ruling in 1945 and retroactively applied the revocation to 1943 and 1944. The Supreme Court, noting that the "Commissioner's earlier rulings were grounded upon an erroneous interpretation of the term 'club' in §101(9) and thus were based upon a mistake of law," stated (*id.* at 183):

> The petitioner argues that, in the light of the 1934 and 1938 rulings, the Commissioner was equitably

> estopped from applying the revocation retroactively. This argument is without merit. *The doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law.* (Emphasis added.)[8]

See also *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U. S. 223 (1965). "An agency, like a court, can undo what is wrongfully done by virtue of its order."[9]

This principle was applied to Part I of the Federal Power Act in *Niagara Falls Power Co.* v. *FPC*, 137 F.2d 787 (2d Cir. 1943), *cert. denied*, 320 U. S. 792 (1943). The error there was in the interpretation of Section 23(a) of the Act (16 U.S.C. 816). The section provides that if the holder of a permit which was issued prior to approval of the Act surrenders the permit and obtains a license, the Commission will determine the net investment in the development according to its fair value. Niagara Falls had held several Federal water diversion permits, but when the Act was approved, the last of these expired by its terms, and Niagara Falls was left with only state water diversion rights. The Commission, interpreting "permit" as used in Section 23(a) to refer to state as well

---

8. *Cf., United States* v. *San Francisco*, 310 U. S. 16, 31-32 (1940); *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 408-409 (1917).

9. The Commission in *United Gas* granted certificates under the Natural Gas Act (15 U.S.C. 717-717w) without imposing conditions as to sales contract prices. On appeal the Commission was held to have erred in not conditioning the certificates and its order was vacated. The Commission instituted a second proceeding to determine appropriate conditions. Meanwhile, the gas was being sold under the original sales contract prices. The certificates granted in the second proceeding were conditioned to lower prices, and the Commission ordered a refund of the amounts collected in excess of these prices. The Supreme Court sustained the refund order.

as Federal authorizations, issued a fair value license. Later, the Commission, reversing itself, held that "permit" referred only to Federal authorizations, and in determining Niagara Falls' net investment, refused to use the fair value standard. The Second Circuit, through Judge Learned Hand, sustained the Commission's second interpretation of the statute. Although Section 6 of the Act expressly provides that licenses "may be altered . . . only upon mutual agreement between the licensee and the Commission . . ." (16 U.S.C. 799), the court held that the fair value license condition did not need to be followed in determining net investment.[10]

Although the court in the *Niagara Falls* case, as well as those in the *Automobile Club* and *United Gas* cases, cited above, did not find it necessary to invoke any statutory provision as the source of the agency's authority to correct mistakes, such provision exists. Section 309 of the Act (16 U.S.C. 825h) authorizes the Commission to "amend . . . and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this Act." The Eighth Circuit in *Northwest Public Service Co.* v. *Montana-Dakota Utilities Co.*, 181 F.2d 19, 23 (8th Cir. 1950), *affirmed*, 341 U. S. 246 (1951), used this section in support of its conclusion that: "The Commission can no doubt, correct its own mistakes."[11]

---

10. *Cf., Pennsylvania Water & Power Co.* v. *FPC*, 123 F. 2d 155, 162-163 (D. C. Cir. 1941), *cert. denied*, 315 U. S. 806 (1941).

11. *Cf., Public Service Commission of the State of New York* v. *FPC*, 327 F. 2d 893, 897 (D. C. Cir. 1964) (construing the parallel provision of the National Gas Act (15 U.S.C. 717o)); *Power Authority of the State of New York* v. *FPC*, 339 F. 2d 269, 274 (2d Cir. 1964).

II

The final sentence of Section 23(b) provides that when the Commission makes findings on declarations of intention that proposed construction would not affect the interests of interstate or foreign commerce, "permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws." Section 4(g) of the Act (16 U.S.C. 797 (g)) authorizes the Commission "to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water resources of the Nation," and Section 309 authorizes it "to perform any and all acts, and to prescribe . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of this Act." The issue is whether Congress intended that the permission granted under Section 23(b) would bar the Commission from subsequently requiring licenses under Sections 4(g) and 309 when it becomes clear that the interests of interstate or foreign commerce will be affected.

The Commission and the courts have held that Congress did not have such an intent. The last of the Commission's findings on Petitioner's declarations of intention spelled out that "while there may be no basis at the time a declaration of intention is filed for requiring a license for a single development, such a development in combination with others in the watershed may later be found to affect the interests of interstate commerce and hence Federal licenses might then be required for all the developments in the headwaters."[12] 8 F.P.C. 1119. The

12. Petitioner states that after it was thus advised, it "proposed no more hydroelectric developments in the area." Its point appears to be that by proposing no more developments it could assure that it would not be required to take licenses on its constructed developments. But, of course, Petitioner is not the only entity which is entitled to propose developments and receive licenses in the Little Tennessee River basin.

Eighth Circuit came to a like conclusion in *Taum Sauk*. The court held that the evidence of record would not support a finding that the Taum Sauk development would affect downstream navigability on the Black River. *Union Electric Co.* v. *FPC*, 326 F. 2d 535 (8th Cir. 1964). Under the court's interpretation of Section 23(b) of the Act—that "interests of interstate or foreign commerce" referred only to navigation and water commerce—Union Electric would have received permission to build the development under the final sentence of the section.[13] Yet the court said (*id.* at 553):

> If in the operation of the project it later develops at any time in the future that the navigability of the Black River is impaired or threatened to be impaired, the Commission would have authority under §4(g) of the Act to issue an appropriate order, including an order to prevent further operation of the project without a license.

Thus, as construed in these decisions, the permission granted under the final sentence of 23(b) plainly does not guarantee that the declarant will not be required to take licenses. And while the Commission and the Court addressed themselves to situations in which licenses are needed because of a change of facts, their conclusions would apply equally in situations in which licenses are needed to correct a mistake of law.

The above decisions, we believe, accurately construe Congress' intent. The obvious purpose of the final sentence

13. The Supreme Court, reviewing the Eighth Circuit's decision, assumed without holding that the lower court's decision was accurate with respect to effect on downstream navigability. It then reached and, as we have noted, reversed the lower court's restrictive reading of "the interests of interstate or foreign commerce." *FPC* v. *Union Electric Co.*, 381 U. S. 90, 93-94 at note 6 (1965).

of Section 23(b) was to make lawful the construction without licenses of certain hydroelectric developments on waters over which the United States exercises control. We assume that Congress by expressly authorizing the construction of these developments also implicitly authorized their operation and maintenance. Since Petitioner's developments were lawfully built and operated, any licenses issued as a result of the present proceeding would not be made retroactively effective to the date of construction.[14] We find nothing in the language of the section or its legislative history which shows that Congress also intended to authorize their operation and maintenance once the Commission has issued orders requiring licenses in response to a change in the factual situation or for the purpose of correcting a mistake of law.[15] We are constrained by a familiar rule of statutory construction to find that a Congressional permit does not include anything which is not expressly stated or necessarily implied. "[A]ll federal grants are construed in favor of the Government lest they be enlarged to include more than what was expressly included." *United States* v. *Grand River Dam Authority*, 363 U. S. 229, 235 (1960). *Accord, Charles River Bridge* v. *Warren Bridge*, 36 U. S. (11 Pet.) 420, 545-553 (1837); *Reichelderfer* v. *Quinn*, 287 U. S. 315, 321 (1932); *Northwest Paper Co.* v. *FPC*, 344 F. 2d 41, 51 (8th Cir. 1965). The rule applies with special force when grantees try to deprive private rights of an indefeasi-

14. On backdating see: *Central Maine Power Co.* v. *FPC*, 345 F. 2d 875 (1st Cir. 1965); *Bangor Hydro-Electric Co.* v. *FPC*, No. 6614, 1st Cir., January 13, 1966; *Public Service Company of New Hampshire*, 27 F.P.C. 830 (1962); *Niagara Mohawk Power Corp.*, Project Nos. 2318, 2320, 2330, and 2424, November 15, 1965.

15. When Section 23(b) was added to the Act in 1935 (49 Stat. 846), the final sentence was not discussed in the hearings, reports, or debates.

ble nature from a Federal grant under the commerce power. *Louisville Bridge Co.* v. *United States,* 242 U. S. 409, 417 (1917); *Bridge Co.* v. *United States,* 105 U. S. 470, 480 (1881). See generally 3 SUTHERLAND, STATUTORY CONSTRUCTION §6402 (3d ed. 1943).

Moreover, Congress' objectives in Part I of the Act (16 U.S.C. 791-823) in general, and its objectives in the 1935 amendments in particular, would not be served by a restrictive reading of the Commission's power to require licenses for constructed developments. Congress' general purpose was to delegate to a specialized, expert body authority for continuing, comprehensive planning for the Nation's hydroelectric resources. *First Iowa Hydro-Electric Cooperative* v. *FPC,* 328 U. S. 152, 180 (1946); *FPC* v. *Union Electric Co.,* 381 U. S. 90, 98-101 (1965). Toward this end, Congress acted "to centralize the authority over such resources in one Government agency." *Northwest Paper Co.* v. *FPC,* 344 F.2d 47, 51 (8th Cir. 1965); *accord,* 32 Ops. Att'y Gen. 525 (1921). It gave the agency "sweeping authority and a specific planning responsibility." *Scenic Hudson Preservation Conference* v. *FPC,* 354 F.2d 608, 613 (2d Cir. 1965). In short, the "legislation was designed to vest in the Commission for the future, the control and jurisdiction which Congress had previously exercised . . ." *Northwest Paper Co.* v. *FPC, supra,* at 52.

Section 23(b), making mandatory the filing of declarations of intention, was added to the Act in 1935 to give the Commission more effective control of the hydroelectric industry. H.R. Rep. No. 1318, 74th Cong., 1st Sess. 25-26 (1935); S. Rep. No. 621, 74th Cong., 1st Sess. 46-47 (1935). At the same time, Section 4(g) was adopted to confer upon the Commission investigatory and enforcement powers "designed to strengthen the power of the Commis-

sion to protect the water resources entrusted to its care." H.R. Rep. No. 1318, 74th Cong., 1st Sess. 23 (1935).

We note, further, that the Commission, to issue an order requiring a license, need not show that the development is not presently making optimum use of the water-power resources. Section 309, by its terms, permits the Commission to require licenses simply on a showing that the developments are within jurisdictional criteria. And while Section 4(g) requires that orders issued pursuant to it be appropriate to conserve and utilize water-power resources, all licensing serves this purpose by retaining control for the future. See, for example, Sections 14 and 15 of the Act (16 U.S.C. 807, 808), providing that upon expiration of licenses the United States may take over developments or the Commission may relicense them to a new licensee.

III

Petitioner argues that requiring licenses for its developments would be a taking of property without compensation. Its contention appears to be that Section 14 of the Act (16 U.S.C. 807), relating to recapture of developments by the United States upon expiration of their licenses, can be applied only as an exercise of the United States' dominant navigation servitude, which is not involved when jurisdiction is based on *Taum Sauk*. Congress clearly intended that this section apply to all projects of this size. See Section 10(i) of the Act (16 U.S.C. 803(i)). The Supreme Court has noted that the statutory scheme of Part I has been several times reviewed and approved by the courts. *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U. S. 152, 181 (1946). In any event, we must presume the constitutionality of the statutes which we administer. *Panitz* v. *District of Columbia*, 112 F. 2d 39,

41-42 (1940); *East Ohio Gas Co.*, 1 F.P.C. 586, 592 (1939); *Mississippi River Fuel Corp.*, 2 F.P.C. 170, 175 (1940).

Petitioner's final argument, reached only if its other arguments are rejected, is that since power production at its developments is scheduled by TVA under the terms of the Fontana Agreements, the developments, even though attended by Petitioner's personnel, are operated by TVA and therefore are exempted by Section 26(a) of the TVA Act from requiring licenses from the Commission (16 U.S.C. 831y-1).[16] Petitioner's parent, Alcoa, previously made this argument on parallel facts in *Aluminum Company of America*, 13 F.P.C. 14, 21-22 (1954). The Commission said in its decision in that case: "It was not the purpose of . . . Section 26(a) to take away from the Federeal Power Commission its licensing authority over non-federal projects (See p. 22 of the March 28, 1935 Hearings before the House Committee on Military Affairs, on H.R. 6793, 74th Cong., 1st Sess.)." *Id.* at 22. The Commission held that the developments were operated by Alcoa or its subsidiaries, and not by TVA, and ordered that applications for licenses be filed.[17] *Id.* at 32. We adhere in the present proceeding to the holding in *Aluminum Company.*

16. Section 26(a) of the TVA Act provides in pertinent part:

> The requirements of this section shall not be construed to be a substitute for the requirements of any other law of the United States or of any State, now in effect or hereafter enacted, but shall be in addition thereto, so that any approval, license, permit, or other sanction now or hereafter required by the provisions of any such law for the construction, operation, or maintenance of any structures whatever, except such as may be constructed, operated, or maintained by the Corporation, shall be required, notwithstanding the provisions of the section.

17. Alcoa and its subsidiaries filed a petition to review the Commission's order in the District of Columbia Circuit, but the petition was later withdrawn, and the review proceeding was dismissed. The licenses, which were issued in *Tapoco, Inc.*, 14 F.P.C. 610 (1955), were accepted by the applicants.

While the petition for a declaratory order requests a hearing, it both states facts sufficient to reach a decision[18] and fails to raise any issue upon which additional evidence need be adduced. In these circumstances, a hearing would not be useful and is not necessary. As the Fourth Circuit said in *Virginia Electric and Power Co.* v. *FPC*, 351 F.2d 408, 410 (4th Cir. 1965), "due process [does not] require a hearing where, as here, no factual controversy exists and the litigant seeks merely to controvert the legal principles upon which the Commission acts, something he can readily do by exercising his statutory right of appeal to the federal courts." *Cf., FCC* v. *WJR, The Goodwill Station, Inc.*, 337 U. S. 265 (1949).

The Commission further finds:

The Nantahala Power and Light Company's Nantahala, Thorpe, Queen's Creek, Tuckasegee, Cedar Cliff, Bear Creek, and Tennessee Creek hydro-electric developments in the Little Tennessee River basin are located on headwaters of navigable waters of the United States and generate energy for an interstate power system.

The Commission orders:

The Nantahala Power and Light Company shall file applications for licenses under the Federal Power Act for the above named hydroelectric developments within ninety days of the later of (1) issuance of the instant order, or (2) if the Company files a petition to review under Section 313 of the Act (16 U.S.C. 8251), entry of a final order by the Court of Appeals sustaining the Commission's orders.

By the Commission.

JOSEPH H. GUTRIDE,
Secretary.

(SEAL)

18. Section 1.7(c) of the Commission's Rules of Practice and Procedure requires that petitions for declaratory orders "include a complete statement of the facts and grounds prompting the petition . . ."

FPC Denial of Rehearing

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, David S. Black, and Carl E. Bagge.

Docket No. E-7261

NANTAHALA POWER AND LIGHT COMPANY

ORDER DENYING PETITION FOR REHEARING AND RECONSIDERATION

(Issued September 6, 1966)

Nantahala Power and Light Company on August 16, 1966, filed a petition for rehearing and reconsideration of the declaratory order issued on July 18, 1966, which requires that Petitioner file applications for licenses under the Federal Power Act for its Nantahala, Thorpe, Queen's Creek, Tuckasegee, Cedar Cliff, Bear Creek, and Tennessee Creek hydroelectric developments in the Little Tennessee River basin.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the above-described petition for rehearing and reconsideration of the declaratory order of July 18, 1966, present no facts or principles of law which, were not considered by the Commission when it issued the order or which, having now been reconsidered, warrant any change or modification of the order.

The Commission orders:

The above-described petition for rehearing and reconsideration of the declaratory order of July 18, 1966, is denied.

By the Commission.

(SEAL)

GORDON M. GRANT,

Acting Secretary.